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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The National Exchange Carrier Association, Inc.	)	CC Docket 80-286
	)	
Petition for Interim Waiver of Section 36.2(a)(3) of the Commission's Rules	)	

REPLY COMMENTS IN SUPPORT OF PETITION FOR WAIVER

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SUMMARY

United Telephone Association ("United") and Elkhart Telephone Company ("Elkhart) (together, the "Rural Carriers") support NECA's petition for interim waiver of §36.2(a)(3) of the Commission's rules, which requires incumbent LECs ("ILECs") to use traffic studies in order to develop the "actual use" measurements used to perform jurisdictional separations. The requested waiver would allow rate-of-return regulated ILECs to use data from a specified prior study period (or an average of data from several study periods), rather than current data, to perform the traffic studies used to develop these "actual use" measurements. While NECA's interim waiver request was made only on behalf of participants in its traffic sensitive access charge pool, the public interest requires that the interim waiver apply equally to all rate-of-return carriers, including Elkhart.

Although Commission precedent establishes that Internet traffic is essentially interstate in nature, Internet traffic is currently allocated to the intrastate jurisdiction. Thus, the recent explosive growth in Internet traffic has dramatically increased the percentage of minutes assigned to the intrastate jurisdiction. This increase will cause the separations rules to shift substantial costs to the intrastate jurisdiction, which will in turn, place upward pressure on local rates in order to recover those costs.

Such an outcome would violate §254(i) of the Communications Act of 1934, as amended (the "Act"), which directs the Commission to "ensure that universal service is available at rates that are just, reasonable and affordable."[1] The imminent deployment of Internet telephony will only increase the pressure placed on local rates, and the corresponding harm to the public

[1] 47 U.S.C. § 254(i).

interest, as subscriber demand for Internet access increases, and the number of long distance subscribers decreases.

In addition to the harm caused to the public interest by increases in local rates, allocation of Internet minutes to the intrastate jurisdiction creates a system of implicit subsidies, with local service customers subsidizing businesses using the Internet, and rural subscribers subsidizing urban Internet users. The implicit subsidy which results from the allocation of Internet traffic to the intrastate jurisdiction, clearly violates Section 254(e) of the Act, which directs the Commission to identify and eliminate implicit subsidies.[2]

MCI Telecommunications Corporation ("MCI") and The Association for Local Telecommunications Services ("ALTS") oppose NECA's petition, and urge the Commission to confirm that Internet traffic is properly allocated to the intrastate jurisdiction. The arguments raised by MCI and ALTS are based on flawed reasoning, and lack merit.

The grant of NECA's petition for interim waiver would not prejudge issues the Commission is currently considering in other proceedings; it would simply prevent the significant harm to the public interest which will result from the allocation of Internet traffic to the intrastate jurisdiction. Accordingly, the Rural Carriers urge the Commission to grant NECA's waiver petition on an expedited basis, effective with the 1997 separations studies, and to extend the waiver equally to all rate-of-return carriers.

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[2] 47 U.S.C. § 254(e).

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REPLY COMMENTS IN SUPPORT OF PETITION FOR WAIVER

United Telephone Association ("United") and Elkhart Telephone Company ("Elkhart) (together, the "Rural Carriers"), by and through their attorneys, offers these reply comments in support of the petition for interim waiver of §36.2(a)(3) of the Commission's rules[3] filed by the National Exchange Carrier Association, Inc. ("NECA").[4]

I. INTRODUCTION

United and Elkhart are both rural local exchange carriers ("LECs") located in Kansas. United participates in NECA's traffic-sensitive access charge pool, while Elkhart does not. Both carriers rely heavily on interstate access charges to provide the revenue they require to recover their infrastructure investment and operating costs. Many of the Rural Carriers' customers regularly access the Internet using the Rural Carriers' network facilities.

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[3] 47 C.F.R. § 36.2(a)(3)

[4] NECA requested interim waiver of §36.2(a)(3) only on behalf of carriers participating in its traffic sensitive access charge pool. As explained in greater detail below, however, the public interest requires that the interim waiver of §36.2(a)(3) extend equally to all rate-of-return carriers, including Elkhart.

The petition filed by NECA requests an interim waiver of §36.2(a)(3) of the Commission's rules, which requires incumbent LECs ("ILECs") to use traffic studies in order to develop the "actual use" measurements used to perform jurisdictional separations.[5] ILECs generally use traffic studies based on *current* data in order to develop these "actual use" measurements. The requested waiver would allow ILECs to use data from a specified prior study period (or an average of data from several study periods), rather than current data, to perform the traffic studies used to develop these "actual use" measurements. While NECA's interim waiver request was made only on behalf of participants in its traffic sensitive access charge pool, for the reasons set forth below the public interest requires that the interim waiver apply equally to <u>all</u> rate-of-return carriers, including Elkhart.

Historically, a larger proportion of traffic has been assigned to the interstate jurisdiction. Because Internet traffic is currently allocated to the intrastate jurisdiction, however, the recent explosive growth in Internet traffic has dramatically altered the percentage of minutes assigned to the intrastate jurisdiction. Where a large proportion of traffic was once classified as interstate, increases in Internet traffic have skewed the balance of intrastate/interstate traffic. As explained in greater detail below, the increase in minutes allocated to the intrastate jurisdiction will leave ILECs with no choice but to substantially raise local rates. Such an outcome would violate

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[5] "Jurisdictional separations" refers to the process by which ILECs apportion regulated costs between the state and interstate jurisdictions. ILECs perform detailed traffic studies in order to identify relative state and interstate usage of telecommunications plant. The data collected in these traffic studies determines jurisdictional allocation factors. Costs are allocated between the intrastate and interstate jurisdictions based on these jurisdictional allocation factors. Whether traffic is allocated to the intrastate or interstate jurisdiction depends on the ultimate "point of termination" of the traffic.

§254(i) of the Communications Act of 1934, as amended (the "Act"), which directs the Commission to "ensure that universal service is available at rates that are just, reasonable and affordable."[6] Moreover, recovering Internet-related costs through local rates constitutes an implicit subsidy which violates Congress' policy of identifying and eliminating implicit subsidies.

In recognition of the fact that allocating Internet traffic to the intrastate jurisdiction poses a significant threat to the public interest, the Commission is currently involved in two proceedings concerning separations treatment of Internet traffic.[7] The waiver requested by NECA would permit ILECs to use data from a specified prior study period (or an average of data from several study periods) *on an interim basis* to establish the "actual use" measurements used to determine the relative intrastate/interstate use of facilities. The waiver would remain in effect pending a final determination regarding the appropriate treatment of Internet traffic for separations purposes.

The Commission must apply a "public interest" standard in considering NECA's waiver request.[8] It is clear that the pressure on local rates caused by allocation of Internet traffic to the intrastate jurisdiction, and the implicit subsidy created by such an allocation, are in direct contravention of both the Act and Congressional policy, and are therefore contrary to public

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[6] 47 U.S.C. § 254(i).

[7] See Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, *Notice of Proposed Rulemaking*, 12 FCC Rcd 22, 120 (1997); In re Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, *Public Notice*, CCB/CPD 97-30 (released July 2, 1997).

[8] See WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

policy. Accordingly, the Rural Carriers urge the Commission to grant NECA's waiver petition on an expedited basis, effective with the 1997 separations studies, and to extend the waiver equally to all rate-of-return carriers.

II. ALLOCATION OF INTERNET TRAFFIC TO THE INTRASTATE JURISDICTION IS NOT IN THE PUBLIC INTEREST

In most circumstances, an Internet "call" originates at the end-user's personal computer and is carried by the originating LEC to an access node owned by an Internet Service Provider ("ISP"), usually located within the end-user's local calling area. Once it reaches the ISP's access node, the "call" is connected to the Internet and is transmitted to its final destination, which in most instances is outside the local calling area.

Although the question of whether Internet traffic should be classified as intrastate or interstate has produced significant debate, long-standing precedent makes clear that this traffic is properly classified as interstate. It is a fundamental principle of separations methodology that traffic is allocated to a particular jurisdiction based on the locations of the customer premises equipment ("CPE") at the point where the call originates, and the CPE at the point-of-termination.[9] Thus, the jurisdiction of Internet traffic is properly determined by its point-of-termination. Since the point-of-termination for most, if not all, Internet traffic is outside the local calling area of the end-user, it is clear that Internet traffic is properly characterized as interstate.

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[9] See In re MCI Telecommunications Corp. Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, *Memorandum Opinion and Order*, 57 RR 2d 1573, 1582 ¶25 (1985) ("interstate usage generally ought to be estimated as though every call that enters [a carrier's] network at a point within the same state as that in which the station designated by dialing is situated were an intrastate communication and *every call for which the point of entry is in a state other than that where the called station is situated were an interstate communication.*") (emphasis added).

Thus, Internet "calls" are conceptually analogous to long distance calls, in the sense that they involve the delivery of a call from a LEC to a separate carrier, which then completes the interstate transmission.

Notwithstanding the obvious similarities between ISPs and IXCs, regulators have consistently taken a "hands-off" approach to regulation of the Internet. Commissioner Susan Ness has observed that "the FCC has made conscious decisions to limit application of its rules" to the Internet in order to avoid stifling growth and innovation .[10] This reluctance to apply existing regulation led regulators to conclude that ISPs should not be required to pay access charges to the LECs which originate their traffic. To accomplish this goal, Internet traffic has been designated as local traffic, based on the fiction that ISPs are end-users, rather than carriers. In truth, the designation of ISP traffic as local is less a function of reality than a function of regulatory convenience.

While designating Internet traffic as local traffic accomplished the goal of protecting ISPs from being forced to pay access charges, the designation poses a serious threat to the public interest. Inclusion of Internet minutes in intrastate traffic volumes will result in a decrease in the percentage of costs allocated to the interstate jurisdiction. This, in turn, will cause a decrease in access charge revenue recovered by ILECs, and a corresponding increase in the rates charged to local consumers. The increase in local rates is likely to be significant, in order to account for the ever-increasing volume of Internet traffic, and to provide revenue sufficient to enable the investments and upgrades necessary to satisfy customers' demands for new services, and the

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[10] Remarks of Commissioner Susan Ness before the Washington Web Internet Policy Forum, Washington D.C., February 9, 1998.

requirement that "[a]ccess to advanced telecommunications and information services . . . be provided in all regions of the Nation."[11]

Moreover, the imminent deployment of Internet telephony will result in increased subscriber demand for Internet access, but a decrease in subscribers paying the long distance charges which, in part, flow back to the ILECs through access charges paid by interexchange carriers ("IXCs"). The additional and continuing reduction in access charge revenue will force local rates to climb even higher, and will compromise the ILECs' ability to provide universal service. Rural and high cost area subscribers will be the ultimate losers. Clearly, the public interest is not served by the denial of NECA's interim waiver request, which would contravene Congress' express mandate that the Commission ensure the affordability of local service, and would place in jeopardy the ILECs' ability to even maintain their existing networks.

In addition to the harm caused by increases in local rates, allocation of Internet minutes to the intrastate jurisdiction creates a system of implicit subsidies, with local service customers subsidizing businesses using the Internet, and rural subscribers subsidizing urban Internet users. Many, if not most, business customers subscribe to an Internet access service. Comparatively, the number of residential customers who access the Internet is far smaller. Accordingly, residential customers who are forced to pay higher local rates because Internet traffic is considered to be local for separations purposes, are subsidizing the business customers' use of the Internet.

[11] 47 U.S.C. § 254(b)(2).

The same dynamic exists between urban and rural customers. Far more urban subscribers than rural subscribers use the Internet; thus, rural subscribers implicitly support urban subscribers' use of the Internet by paying higher rates for local service. The burden placed on rural subscribers will intensify as the number of Internet subscribers using the Internet to place long distance calls increases, access charges decrease, and local rates spiral upwards. The implicit subsidy which results from allocation of Internet traffic to the intrastate jurisdiction, clearly violates Section 254(e) of the Act, which directs the Commission to identify and eliminate implicit subsidies.[12]

Accordingly, the Commission must grant NECA's petition for interim waiver. Allowing ILECs to use data from a specified prior study period, pending a decision concerning the appropriate treatment of Internet traffic for separations purposes, would not prejudge issues the Commission is currently considering in other proceedings. It would simply prevent the significant harm to the public interest which will result from the allocation of Internet traffic to the intrastate jurisdiction.

Commission precedent supports grant of the interim waiver requested by NECA. In <u>MTS and WATS Market Structure Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board,</u>[13] the Commission granted a similar request for interim waiver of §36.372 of the Commission rules, which excluded access revenue from the allocation

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[12] 47 U.S.C. § 254(e).

[13] *Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking*, 2 FCC Rcd. 5349 (1987).

factor for marketing expenses.[14] Responding to evidence that this treatment of marketing expenses might cause a significant and detrimental shift of the revenue requirement to the state jurisdiction, the Commission opted to follow the "prudent course" and adopted an allocation factor for marketing expenses which included access revenue, pending a final decision by the Joint Board concerning whether to include access revenue in the allocation factor for marketing expenses.

The harm to the public interest described above is most likely to occur in areas served by small rate-of-return LECs, like the Rural Carriers. Unlike larger carriers, these small carriers have few alternate sources of revenue and an extremely limited ability to raise local rates in order to recover revenue shortfalls. In addition, larger carriers appear to have the technical ability to route Internet traffic in such a way that it bypasses their switches; thus, the allocation of Internet traffic to the intrastate jurisdiction is primarily a problem for the small LECs.[15]

Since the problems described above are most likely to occur in areas served by small LECs, the Rural Carriers join the Western Alliance, the Rural Telephone Coalition and the Small Western LECs in requesting that the interim waiver sought by NECA apply equally to <u>all</u> rate-of-return LECs, regardless of whether they participate in NECA's traffic sensitive access pool. The Commission has recognized that the public interest is served by allowing LECs to file individual tariffs. Thus, it would be unreasonable to discriminate against those carriers which file their own access tariffs. The public interest will be harmed if either type of small carrier -- those

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[14] 47 C.F.R. § 36.372.

[15] See Western Alliance Comments at 7.

participating in NECA's traffic sensitive access pool, or those that do not -- is required to allocate Internet traffic to the intrastate jurisdiction. Accordingly, the Commission should grant NECA's request for interim waiver, and extend the same waiver provision to all rate-of-return LECs.

III. OPPOSITION OF MCI AND ALTS TO NECA'S PETITION FOR WAIVER

MCI Telecommunications Corporation ("MCI") and The Association for Local Telecommunications Services ("ALTS") oppose NECA's petition for waiver, and urge the Commission to confirm that Internet traffic is properly allocated to the intrastate jurisdiction. The arguments raised by MCI and ALTS clearly lack merit.

MCI and ALTS premise their claims on the assumption that the Commission's preliminary treatment of Internet traffic as local represent its definitive statement on the matter.[16] Contrary to this assertion, however, the Commission has not conclusively determined that Internet traffic must be treated as local traffic for separations purposes.

As mentioned above, the Commission is currently involved in two proceedings addressing the proper treatment of Internet traffic for separations purposes. Moreover, recent comments by Commissioner Susan Ness reflect the unsettled state of Internet regulation. Commissioner Ness observed that "as the Internet grows and evolves, we are being asked to review existing regulatory classifications and their attendant consequences."[17] Commissioner Ness further remarked that:

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[16] MCI Comments at 3; ALTS Comments at 1-3, 9-10.

[17] Remarks of Commissioner Susan Ness before the Washington Web Internet Policy Forum, Washington D.C., February 9, 1998.

> "Some people see the blurring of boundaries between the Internet and traditional telecommunications and conclude that the best solution is to expand our existing regulatory structure to encompass the Internet . . . The problem is that these approaches push square pegs into round holes. If we insist on mechanical application of old rules to new technologies, we will end up with unsatisfactory results."[18]

It is clear that there are significant disadvantages to pushing the square peg of Internet traffic into the round hole of intrastate/interstate jurisdictional separations. It is equally clear that the Commission intends to uncover and address problems related to the permanent application of existing regulatory classifications to ISPs, and that it is currently doing so in the case of the separations treatment of Internet traffic. Thus, the assumption that the Commission has concluded its inquiry into the proper treatment of Internet traffic for separations purposes is erroneous. It is precisely *because* the Commission has not concluded its inquiry, that NECA has requested the waiver of §36.2(a)(3).

MCI and ALTS further allege that NECA has not defined the consequences of allocating Internet traffic to the intrastate jurisdiction, or made the requisite showing of harm to justify a waiver.[19] It is beyond debate, as explained above, that the public interest will be significantly harmed by the allocation of Internet minutes to the intrastate jurisdiction. Clearly, the dire nature of this outcome represents a special circumstance justifying a waiver of §36.2(A)(3).

MCI challenges NECA's contention that Internet traffic should be treated as interstate traffic, and asserts that the question of how to treat Internet traffic "should be examined in a comprehensive manner in the separations reform proceeding, not prejudged in a waiver

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[18] Id.

[19] MCI Comments at 4; ALTS Comments at 8-9.

proceeding."[20] ALTS echoes this statement, noting that the Commission has not yet determined the issue of whether calls to ISPs are interstate telecommunications.[21] MCI and ALTS have missed the point of NECA's waiver petition.

To the extent NECA sought in its petition to characterize Internet traffic as interstate, it did so only for the purpose of establishing the fact that the current separations treatment of Internet traffic is flawed. NECA readily acknowledged that the Commission is considering the issue of the separations treatment of Internet traffic in various separate proceedings, and requested a waiver only until such time that the Commission determines with finality the proper treatment of Internet traffic for separations purposes.[22]

The Rural Carriers agree that the separations treatment of Internet traffic should be addressed in the separations reform proceeding, and not prejudged in the instant proceeding. Accordingly, in order to avoid an outcome tantamount to prejudgment of the issue, the Commission must grant NECA's petition for waiver. As explained above, forcing ILECs to allocate Internet traffic to the intrastate jurisdiction will violate the Act and, in so doing, will cause significant harm to the public interest. Conversely, allowing ILECs to exclude Internet traffic from their traffic studies will essentially maintain the status quo, and will guard against spiraling increases in local rates and the creation of implicit subsidies prohibited by the Act.

ALTS argues that freezing separations allocators pursuant to NECA's proposed interim waiver would unfairly shift a portion of the cost of serving ISPs to interexchange carriers. Under

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[20] MCI Comments at 5.

[21] ALTS Comments at 10-11, 13.

[22] NECA Petition at 3.

NECA's proposal, however, neither ILECs nor IXCs would be forced to absorb the costs associated with increased Internet usage. By permitting ILECs to use data collected during a study period (or average of study periods) *prior* to the explosion in Internet usage, the waiver would allow carriers to rely on data which includes little or no Internet traffic; in essence, the waiver would allow carriers to disregard Internet traffic until the Commission has determined how to treat it for separations purposes.[23] Thus, ALTS' objection cannot be sustained.

[23] The fact that, under NECA's proposed waiver, Internet traffic would not be allocated to the interstate jurisdiction, but would instead be ignored, renders moot ALTS' claim that the allocation of Internet traffic to the interstate jurisdiction would violate Smith v. Illinois Bell, 282 U.S. 133 (1930). Internet traffic would not be allocated to the interstate jurisdiction. See ALTS Comments at 3-6.

IV. CONCLUSION

For all of the foregoing reasons, the Rural Carriers respectfully request that the Commission grant the petition for interim waiver of §36.2(a)(3) requested by NECA, and that the waiver be extended to all rate-of-return carriers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 1998, a copy of the foregoing Comments in Support of Petition for Waiver was served by hand delivery (as indicated) or by first-class mail, postage prepaid, upon the parties on this service list.

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